Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MARVIN L. CANAAN,

Petitioner,

v.

MICHAEL BARTEE
D. ALLEN BUSH
MARY CURTIS
and
KELLY JERNIGAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Kansas Supreme Court's decision requiring that a person convicted of a crime obtain "postconviction relief" before maintaining a common law legal malpractice action against his or her former criminal defense attorneys violate the due process clause of the Fourteenth Amendment to the United States Constitution?

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Appendix B — Memorandum Decision Of The District Court Of Johnson County, Kansas Civil Court Department Filed March 15, 2002 ..... 35a

Marvin L. Canaan ("Canaan") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Kansas Supreme Court entered on July 18, 2003, which requires persons convicted of a crime to obtain "postconviction relief" prior to maintaining a common law legal malpractice action against their criminal defense attorney.

OPINIONS BELOW

The opinion of the Kansas Supreme Court is reported at *Canaan v. Bartee*, 72 P.3d 911 (2003) (Appendix A). The opinion of the district court in *Canaan v. Bartee*, Case No. 98C102, is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the Kansas Supreme Court's decision of July 18, 2003.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This a legal malpractice action arising from a criminal proceeding. In January of 1995, petitioner Marvin L. Canaan was charged with murder, aggravated robbery and aggravated battery. *State v. Canaan*, 265 Kan. 835, 964 P.2d 681 (1998). Respondents Michael Bartee and Kelly Jernigan are public defenders. They were appointed to defend Canaan. *Canaan v. Bartee*, 35 P.3d 841 (Kan. 2001). Respondent Allen Bush is a

legal investigator who was assigned to assist Bartee and Jernigan in preparing Canaan's defense. *Id.*

A jury convicted Canaan of all charges. Bartee then filed a Notice of Appeal asserting various trial court errors that warranted a new trial and/or reversal of Canaan's conviction. *See Canaan*, 265 Kan. at 835. Respondent Mary Curtis was appointed to represent Canaan in his direct appeal to the Kansas Supreme Court.

On January 6, 1998, while his criminal convictions were on appeal, Canaan filed this lawsuit against Bartee, Jernigan, Bush and Curtis, alleging causes of action for legal malpractice, negligence, fraud, breach of contract, breach of warranty and intentional harm (hereinafter "legal malpractice"). **(ROA Vol. I, pp. 10-24).** Canaan alleges that he is innocent, that Bartee, Jernigan and Bush failed to properly prepare for and present his defense at trial, and that Curtis failed to properly handle his appeal, all of which caused him to be wrongfully convicted. Canaan seeks economic and non-economic damages in excess of $50,000.00. *Id.*

While Canaan's legal malpractice action was pending, the Kansas Supreme Court affirmed his convictions. Four issues were raised in his appeal, none of which addressed whether Canaan received effective assistance of counsel at trial or on appeal. *State v. Canaan*, 265 Kan. 835, 836-37, 964 P.2d 681 (1998).

On January 10, 2002, respondents sought summary judgment on Canaan's legal malpractice claim asserting that exoneration by post-conviction relief is an absolute prerequisite to the maintenance of a legal malpractice action arising from a criminal proceeding. **(ROA Vol. I, pp. 356-491).** Relying on case law from Alaska, New York, Massachusetts, Oregon,

Wisconsin, Florida, Texas and California, defendants claim that any person convicted of any crime must obtain exoneration by post-conviction relief before suing his or her criminal defense attorney for legal malpractice. **(ROA Vol. I, pp. 299-309).**

While respondents advance various public policy reasons to support their exoneration rule, the *legal* basis for requiring post-conviction relief – according to defendants – is that Canaan's convictions are the proximate cause of the damages he seeks. Therefore, unless and until Canaan is exonerated, his cause of action for legal malpractice has not accrued, and he is collaterally estopped from contending otherwise. **(ROA Vol. I, pp. 356-491).**

Relying on case law from Missouri, Alabama, Ohio, Pennsylvania, Michigan, Nebraska, Indiana and the District of Columbia, Canaan opposed respondents' motion for summary judgment as violating the due process clause of the Fourteenth Amendment to the United States Constitution. **(ROA Vol. I, pp. 206-48).**

Canaan contends that requiring a criminal defendant to obtain post-conviction relief prior to instituting a common law legal malpractice action unconstitutionally deprives persons harmed by the negligence of criminal defense lawyers of "property" without a legal remedy by due course of law, and unconstitutionally infringes upon their ability to exercise their rights "without delay." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Peterson v. Garvey Elevators, Inc.*, 252 Kan. 976, 850 P.2d 893 (1993).

In addition to being unconstitutional, an exoneration rule grants criminal defense attorneys blanket immunity for legal malpractice claims because it allows attorneys to assert their client's conviction (although caused by their negligence) as a

defense to a legal malpractice claim. The fact that a criminal defendant has not been completely exonerated of a criminal offense does not mean that a criminal defendant has not been injured by a lawyer's negligence.

On March 15, 2002, the district court granted respondents' motion for summary judgment. Appendix A, p. 4a. Canaan appealed directly to the Kansas Supreme Court. On July 18, 2003, the Kansas Supreme Court, while noting there is a split amongst the states regarding an exoneration rule, chose to follow the majority of states that have addressed this issue and affirmed the district court's decision holding that:

> A person convicted in a criminal action must obtain postconviction relief before maintaining an action alleging legal malpractice against his or her former criminal defense attorneys.

Appendix A, p. 2a.

On September 3, 2002, in accordance with K.S.A. § 60-1507,[1] Canaan was given a hearing on some of his claims that Bartee failed to properly prepare for and present his defense at trial. The district court characterized Canaan's K.S.A. § 60-1507

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1. K.S.A. § 60-1507 provides in relevant part:

> [a] prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or the laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

motion as one for "ineffective assistance of counsel." **(ROA Vol. I, p. 588)**. In denying Canaan's motion, the district court found that it "must be highly deferential" to defense counsel in ineffective assistance of counsel claims and that Canaan had failed to overcome the "strong presumption that [defense] counsel's conduct falls within the wide range of professional assistance." **(ROA Vol. I, p. 588).**

REASON FOR GRANTING THE PETITION

I. The Rule Promulgated by the Kansas Supreme Court Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution Because it Deprives Convicted Criminals of Property Rights Without Due Process of Law.

A. *Establishing Legal Malpractice Under Kansas Law.*

To prevail on his legal malpractice claim Canaan must establish an attorney-client relationship giving rise to a duty, a breach of that duty, proximate cause between the breach of duty and his injuries, and damages. *Bergstrom v. Noah*, 266 Kan. 847, Syl. ¶ 4, 974 P.2d 531 (1999). Whether Canaan's criminal defense attorneys committed legal malpractice is a fact question for a civil jury that is immaterial to the issue of whether Canaan was found innocent or guilty.

It is undisputed that Bartee, Jernigan and Curtis had an attorney-client relationship with Canaan, which gave rise to a duty to use reasonable and ordinary care and diligence in handling Canaan's defense and appeal. *No discovery has taken place on the issues of breach of duty or damages.* With regard to proximate cause, the Kansas Supreme Court held that Canaan's convictions are the proximate cause of the damages he seeks and until he is exonerated, the doctrine of collateral estoppel prevents him from alleging otherwise. Appendix A, pp. 11a - 14a.

According to the Kansas Supreme Court, no matter how outrageous and morally reprehensible a criminal defense attorney's behavior may have been, if the criminal defendant has not been exonerated, the criminal defendant cannot sue his or her attorney for legal malpractice – even if the attorney's negligence directly caused the criminal defendant's conviction. Appendix A, p. 2a.

It therefore follows that if an attorney negligently fails to pursue discovery that would have ensured a successful defense, the attorney by his own negligence will have protected himself from liability. In such a case, the more negligent the attorney, the more difficult it is to obtain post-conviction relief. Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 Cornell L.Rev. 666, 670-71 (1978).

B. *A Cause of Action for Legal Malpractice is a Protected Property Interest Under the Fourteenth Amendment.*

The due process clause of the Fourteenth Amendment to the United States Constitution provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law." "*The right of a person injured by the tortious acts of another to a remedy for his injuries is one of the basic constitutional rights guaranteed protection by Kansas courts.*" *Ernest v. Faler*, 237 Kan. 125, 127, 697 P.2d 870 (1985) (emphasis added).

A state tort claim is a "species of 'property' protected by the due process clause." *Martinez v. California*, 444 U.S. 277, 281-282 (1980). The due process clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). "The very essence of civil liberty certainly consists in

the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

The due process clause prevents the Kansas Supreme Court from denying potential litigants use of established adjudicatory procedures because such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). The due process clause requires that the owner of a protected property interest be granted an opportunity to present his or her case and have its merits fairly judged before he or she is deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). A state may not destroy or take away a protected property interest without first giving the owner an opportunity to present his or her claim. *Bell v. Burson*, 402 U.S. 535, 541 (1971).

The Kansas Supreme Court's endorsement of a blanket proposition that requires a plaintiff, in every instance, to obtain exoneration before suing his or her criminal defense attorney for legal malpractice clearly violates the due process clause of the Fourteenth Amendment.

> An action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice. A claim of ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction. Legal malpractice is a common law action, grounded in tort, which seeks monetary damages. The proof of either of these two causes of action does not necessarily establish the other.

Krahn v. Kinney, 538 N.E.2d 1058, 1062 (Ohio 1989).

In addition to being unconstitutional, an exoneration rule is "unjust, making any recovery virtually impossible for those who truly have meritorious legal malpractice claims." *Vahila v. Hall*, 674 N.E.2d 1165, 1170 (Ohio 1997).

C. *The Elements Necessary to Invoke the Doctrine of Collateral Estoppel are Not Present in this Case.*

Collateral estoppel, also known as issue preclusion, prevents a second lawsuit of the same issues between the same parties. *In re Estate of Beason*, 248 Kan. 803, 813, 811 P.2d 848 (1991). Under Kansas law, collateral estoppel may be invoked only where the following is shown:

> (1) a prior judgment on the merits which has determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment, (2) the parties are the same or in privity, and (3) the issue litigated has been determined and necessary to support judgment.

Hawkinson v. Bennett, 265 Kan. 564, Syl. ¶ 7, 962 P.2d 445 (1998); *Penachio v. Walker*, 207 Kan. 54, 57, 483 P.2d 1119 (1971).

In a legal malpractice claim arising from a criminal proceeding, the doctrine of collateral estoppel "is available only if the competence of counsel was in issue" in the criminal proceeding. 2 Mallen & Smith, *Legal Malpractice* § 20.13 at 711 (4th ed. 1996). The issues presented in Canaan's petition in this case were not actually and necessarily litigated and determined at his criminal trial, on appeal, or during his post-conviction relief proceedings under K.S.A. § 60-1507.

No jury has ever considered the evidence, heard the testimony and the cross-examination of fact and expert

witnesses, judged the credibility of these witnesses, and concluded that Bartee, Jernigan, Bush and Curtis used reasonable care and ordinary diligence while representing Canaan. It is a separate legal issue, with different defendants, tried under completely different legal rules, to a completely different jury, under a completely different standard of proof, as to whether Canaan's criminal defense lawyers are liable for legal malpractice.

Collateral estoppel also requires that the legal issues be identical in substance, not merely in form. *Harbor Land Dev. Corp., Inc. v. Mirne, Nowels, Tumem, Magee & Kirschner*, 403 A.2d 937 (N.J. 1979) (plaintiff who succeeds in having deed reformed to express its true intent is not precluded from suing lawyers for failing to effect its intent earlier); *Baldridge v. Lacks*, 883 S.W.2d 947, 950-52 (Mo. Ct. App. 1994) (court determined whether client was properly advised, not whether settlement was reasonable); *Weiss v. Manfredi*, 639 N.E.2d 1122, 1123-24 (N.Y. 1994) (failure to have settlement set aside for fraud, collusion, mistake or accident does not mean plaintiff's attorneys were not negligent); *Garcia v. Borelli*, 129 Cal.App.3d 24 (1982) (plaintiffs who compromise disputes about their rights to take property under a will are not precluded by the resulting decrees of distribution from claiming that they should have received more had their attorney not been negligent in preparing the estate plan).

A particularly inappropriate situation for collateral estoppel is where the plaintiff's prior position was induced by the negligence of his or her attorney. For example, a New Jersey plaintiff was not collaterally estopped by her statement in open court during a divorce proceeding that the settlement was "fair and equitable," since she may have received a more favorable settlement had her lawyer been competent and

discovered hidden marital assets. *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992).

Likewise, in *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977), the plaintiff sued his former defense attorney for negligently representing him on a charge of refusal to submit to military induction. The defendant attorney claimed that the plaintiff's claim was barred by the statute of limitations. The plaintiff asserted that the statute of limitations on his claim was tolled until he obtained reversal of his criminal conviction.

In analyzing the statute of limitations issue, the Missouri Supreme Court illustrated why the doctrine of collateral estoppel is inapplicable to Canaan's claims in this case.

> We conclude that it was not a condition to maintaining suit that the judgment of conviction be set aside. A hypothetical example will illustrate. Suppose that plaintiff in this suit had been sued for damages for negligent conduct in operating his car and defendant attorney advised him he had no defense and should confess judgment. Suppose further that plaintiff followed his attorney's advice and confessed judgment and then paid it. Assume finally that it developed subsequently that the attorney had not investigated the facts or the law and was clearly wrong in his advice. The confession of liability and resulting judgment would at least imply a finding that defendant knowingly recognized and admitted his negligence and liability. However, contrary to plaintiff's theory regarding collateral estoppel, it would not be a condition to a suit against the attorney that plaintiff somehow have set aside the prior judgment finding him negligent and liable in damages. Plaintiff could sue him based on his

> negligent conduct and would not be collaterally estopped from bringing the suit by the judgment that he was negligent and liable to the one who sued him. If plaintiff in this hypothetical situation could prove to the jury that the attorney negligently represented and advised him and that he relied thereon and confessed judgment based on the attorney's advice, he would have proved that which would be necessary for him to recover.
>
> Likewise, in this case, *the existence of the judgment and conviction and the findings therein would not collaterally estop plaintiff from bringing an action against defendant.*

Id. at 313-14 (emphasis added).

Application of collateral estoppel in a legal malpractice case arising from a criminal conviction ignores the fact that "an innocent person can be convicted with adequate counsel, and a guilty person's conviction can be actionable because a lawyer's negligence failed to protect the rights that even a guilty person has." *Stevens v. Bispham*, 851 P.2d 556, 565-68 (Or. 1993) (Unis, J., specially concurring). The fact that a criminal defendant has not been completely exonerated of a criminal offense does not mean that a criminal defendant has not been injured by a lawyer's negligence. *Id.*

Canaan agrees that in most cases "the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy one's ability to establish proximate cause." *Krahn v. Kinney*, 538 N.E.2d 1058, 1062 (Ohio 1989). Canaan does not contend that a malpractice plaintiff should be relieved of the obligation of showing that his or her injury was caused by a defense attorney's negligence. Canaan's position is that

the analysis should be made in accordance with tort law relating to proximate cause, not some judge made rule that creates a legal fiction. "*Lawyers whose clients do not prevail in civil matters do not have the ability to say to their clients, 'You lost; therefore I was not negligent.'*" *Stevens v. Bispham*, 851 P.2d 556, 566-579 (Or. 1993) (Unis, J., specially concurring) (emphasis added).

This Court should reject the suggestion that a proximate cause analysis can be eliminated by a rule of thumb based on whether a malpractice plaintiff has succeeded in overturning an underlying criminal conviction that may have been directly caused by attorney negligence. *Id.*; *Krahn*, 538 N.E.2d at 1062. The right to be heard does not depend upon an advance showing that one will prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit." *Coe v. Armor Fertilizer Works*, 237 U.S. 413, 424 (1915).

D. *Encouragement of Thorough Representation.*

The Kansas Supreme Court stated that "[a]nother reason cited in support of the exoneration rule is the encouragement of thorough representation of criminal defendants." Appendix A, p. 14a. However, giving blanket immunity to lawyers that have done so poor a criminal defense job that they are immune from civil suit, and claiming that this immunity encourages thorough representation of criminal defendants, is an insupportable claim.

In *Ferri v. Ackerman*, 444 U.S. 193 (1979), this Court rejected the same reasoning espoused by the Kansas Supreme Court when it refused to immunize federal public defenders from legal malpractice claims. The Court held that the

"fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with the performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently." *Id.* at 204 (emphasis added). Defense counsel who is appointed by the court has exactly the same duties, burdens and responsibilities as the highly paid criminal defense lawyer. *Id.* at n.17. *See* Clinton M. Daughtrey, *You Only Get What You Pay For? The Current Status of Malpractice Immunity for Indigent Defense Counsel*, 23 J. Legal Prof. 293, 296-301 (1999).

E. ***The Majority Rule: "No Relief – No Harm".***

Despite the inherent unfairness of and analytical flaws associated with an "exoneration" rule, the Kansas Supreme Court is correct in that the majority of courts addressing the issue have held that successful post-conviction relief is a predicate to the maintenance of a "criminal malpractice action."

Alaska, New York, Massachusetts, Oregon, Wisconsin, Florida, Texas and California follow what has been called the "no relief – no harm" rule, which is a legal fiction that means a person convicted of a crime suffers no harm for purposes of bringing a legal malpractice action arising from a criminal proceeding unless and until he or she obtains reversal of their conviction. *Shaw v. State Dept. of Admin. PDA*, 816 P.2d 1358 (Alaska 1991); *Carmel v. Lunney*, 511 N.E.2d 1126 (N.Y. 1987); *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991); *Stevens v. Bispham*, 851 P.2d 556 (Ore. 1993); *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995); *Lynch v. Warwick*, 115 Cal.Rptr.2d 391 (Cal. Ct. App.. 2002); 3 Mallen & Smith, *Legal Malpractice* § 25.3 at 234-43 (4th ed. 1996); Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel – Reflections on Criminal Malpractice*, 21 UCLA L.Rev. 1191 (1974); Gregory

G. Sarno, Annotation, *Legal Malpractice in Defense of Criminal Prosecution*, 4 A.L.R. 5th 272 (1992 Supp. 2001). Several reasons are given for adopting the "no relief – no harm" rule.

1. ***Proximate Cause.***

First, absent relief from a conviction or sentence, the criminal plaintiff's own actions are presumably the proximate cause of his or her injuries. Appendix A, p. 11a; *see Shaw v. State Dept. of Admin. PDA*, 816 P.2d 1358, 1361 (Alaska 1991); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987). This argument is oblivious to the situation where the criminal plaintiff is convicted as a direct result of attorney negligence. The argument also ignores legal malpractice leading to lost plea bargain opportunities, excessive sentences and unnecessary incarceration. And it allows criminal defense lawyers to hide behind their own negligence by asserting their client's conviction – although caused by their own negligence – as a defense to a claim that they were negligent.

2. ***Judicial Economy.***

The Kansas Supreme Court also stated that an exoneration rule promotes "judicial economy" by avoiding the duplication of litigation in a criminal malpractice case that was previously litigated and resolved in a post-conviction or appellate proceeding. Appendix A, p. 14a; *Shaw*, 816 P.2d at 1361. This argument is a red herring. As stated above, it is a separate legal issue, with different defendants, tried under completely different legal rules, to a completely different jury, under a completely different standard of proof, as to whether Canaan's criminal defense lawyers are liable for legal malpractice. More importantly, constitutional rights are not governed by "judicial economy."

3. *Post-Conviction Relief Remedies.*

The third reason advanced in support of an exoneration rule is that appellate, post-conviction and habeas corpus remedies are available to address ineffective assistance of counsel. Appendix A, p. 13a; *Steele v. Kehoe*, 747 So.2d 931, 933 (Fla. 1999). This contention is disingenuous at best. To prevail in an ineffective assistance of counsel claim, the defendant must establish that counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result. The defendant must also demonstrate that counsel's assistance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *State v. Rice*, 261 Kan. 567, 601, 932 P.2d 981 (1997).

The defendant must establish both elements while the defense attorney – *without any basis in fact* – is "strongly presumed to have exercised reasonable professional judgment in making all significant decisions." *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988). This presumption applies to lawyers who are not licensed to practice law in Kansas. It applies to un-licensed lawyers whose mistaken belief as to Kansas law directly causes their client to forego exercising his or her constitutional right to testify in their own defense. The presumption applies to attorneys who are drunk, drugged, mentally ill, and to those who sleep during trial. *Id.*; *State v. Rice*, 261 Kan. 567, 932 P.2d 981 (1997).

Instead of actually requiring effective representation to fulfill the Sixth Amendment's guarantee of counsel, the courts have brought the standard down to the level of "ineffective practice."

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case,

> be represented by able or effective counsel. [. . .] Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.

Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (emphasis in original).

If a criminal defense attorney fails to timely object or otherwise preserve issues for appeal, the defendant's rights are forever lost while the defense attorney is "strongly presumed to have exercised reasonable professional judgment in making all significant decisions." *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988). To make matters worse, a defendant may not base a claim of ineffective assistance of appellate counsel on the fact that his or her appellate counsel failed to brief or raise an issue on appeal which had not been properly preserved for appeal in the manner required by Kansas law. *Littlejohn v. State*, 29 Kan.App.2d 506, Syl. ¶ 1, 28 P.3d 448 (2001). In other words, appellate counsel cannot raise on appeal the grossly negligent conduct of trial counsel, further immunizing criminal defense attorneys from malpractice liability.

Post-conviction relief proceedings under K.S.A. § 60-1507 are not a substitute for a legal malpractice claim. These proceedings are limited to constitutional or jurisdictional issues that subject the sentence at issue to collateral attack. *See Ware v. State*, 198 Kan. 523, 426 P.2d 78 (1967). Discovery is discretionary and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Mebane v. State*, 21 Kan.App.2d 513, Syl. ¶ 2, 902 P.2d 494 (1995). Moreover, K.S.A. § 60-1507 actions and other post-conviction relief remedies do not provide

for damages, nor do they sanction attorneys for inadequate representation. Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent Defense Crisis,* 45 Duke L.J. 783, 808-18 (Feb. 1996).

4. *Frivolous Lawsuits.*

The fourth reason cited in support of an exoneration rule is that there is a concern about "the litigious persons who occupy the time of their incarceration by pursuing civil actions against their former attorneys." 3 Mallen & Smith, *Legal Malpractice* § 25.3 at 240 (4th ed. 1996); *Berringer v. Steele*, 758 A.2d 574, 592-93 (Md. Ct. App. 2000). Yet, any government interest in reducing litigation against criminal defense attorneys is overcome by the risk of denying legitimate due process, and ultimate just compensation, to a criminal defendant harmed by attorney negligence. This contention also ignores the inherent difficulties an indigent defendant has in bringing a successful criminal malpractice claim – difficulties that virtually ensure only meritorious cases will ever be litigated.

To have any chance at success, an indigent defendant must convince a lawyer to take the case on a contingency fee basis. He or she will also have to retain another lawyer to serve as an expert witness to testify that the defense attorney breached the applicable standard of care. Attorneys are not likely to take part in such a case unless it is truly meritorious, and the overwhelming majority of legal malpractice cases provide minimum financial incentive. Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent Defense Crisis,* 45 Duke L.J. 783, 809-10 (Feb. 1996).

> Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis*. And I simply cannot agree with my Brother Black that the

> possibility of 'frivolous' claims – if defined simply as claims with no legal merit – warrants closing the courthouse doors to people in [Canaan's] situation. There are other ways, short of that, of coping with frivolous lawsuits.
>
> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse doors solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 410-11 (1971).

5. *Shifting the Blame*.

The final reason advanced in support of an exoneration rule is that allowing criminal plaintiffs to sue for legal malpractice impermissibly shifts responsibility for the crime away from the convict. The argument is that criminal malpractice claims provide an opportunity to shift much, if not all, of the punishment assessed against convicts for their criminal acts to their former attorneys, drastically diminishes the consequences of the convicts' criminal conduct and seriously undermines our system of criminal justice. Appendix A, pp. 10a.

Canaan is not attempting to shift the responsibility of his alleged criminal conduct to defendants. He is not seeking reversal of his criminal convictions, nor is he seeking release

from prison. He is seeking money damages for the injuries he sustained as a direct and proximate result of his attorneys' negligence.

6. *Actual Innocence.*

Several of the jurisdictions cited above, as well as others, in addition to requiring post-conviction relief, also require a criminal plaintiff to prove he or she is innocent of the criminal charges. *Wiley v. County of San Diego*, 966 P.2d 983, 991 (Cal. App.Ct. 1998); *Gomez v. Peters*, 470 S.E.2d 692, 695-96 (Ga. App. Ct. 1996); *Lynch v. Warwick*, 115 Cal.Rptr.2d 391, 397 (Cal. Ct. App. 2002); *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). The actual innocence requirement applies regardless of whether the criminal plaintiff is seeking damages for wrongful conviction, an excessive sentence, or otherwise. *Lynch v. Warwick*, 115 Cal.Rptr.2d 391, 397 (Cal. Ct. App. 2002).

F. *The Minority Rule.*

Missouri, Alabama, Ohio, Pennsylvania, Michigan, Nebraska, Indiana and the District of Columbia have to one degree or another rejected the "no relief – no harm" rule primarily because the rule subverts the policy underlying statutes of limitation, which are designed to promote stability in the affairs of persons and to avoid the unfairness and burdens inherent in defending stale claims. *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (1994); *Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977); *Mylar v. Wilkinson*, 435 So.2d 1237 (Ala. 1983); *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989); *Quick v. Swem*, 568 A.2d 223 (Pa. 1989); *Seevers v. Potter*, 851 N.W.2d 505 (Neb. 1995); 3 Mallen & Smith, *Legal Malpractice* § 25.3 at 238 (4th ed. 1996).

According to the "no relief – no harm" rule, the statute of limitations does not begin to run on legal malpractice claims arising from criminal proceedings until the conviction is reversed, which may be 25 years after the conviction. Nevertheless, the criminal defense attorney is still required to defend the claim. *Stevens v. Bispham*, 851 P.2d 556, 566-579 (Or. 1993) (Unis, J., specially concurring).

1. *The "Two Track" Approach.*

Some states that have rejected the "no relief – no harm" rule have adopted a "two track" approach to legal malpractice actions arising out of criminal proceedings. With a "two track" approach, if a legal malpractice action is filed, the civil and criminal cases proceed along two separate tracks, and the district court has the ability to stay the civil proceedings to protect the rights of the criminal defendant during the criminal proceedings. *Seevers v. Potter*, 537 N.W.2d 505, 510-11 (Neb. 1995).

The "two track" approach honors the policies underlying statutes of limitations, while respecting the rights of criminal defendants. Unlike the "no relief – no harm" rule, which artificially links harm to relief and places no limit on how long a former defense attorney must be prepared to defend a legal malpractice claim, the "two track" approach provides that the statute of limitations on a legal malpractice action arising from a criminal proceeding is the same as a legal malpractice action arising from a civil proceeding. *Id.*; *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (1994).

In theory, the "two track" approach should ensure that a criminal plaintiff receives his or her day in court regardless of exoneration. In reality, however, most states using the "two track" approach still require the criminal plaintiff to obtain reversal of the underlying conviction before the legal malpractice

action can proceed, which, like the "no relief – no harm" rule, effectively bars all legal malpractice claims arising from criminal proceedings. *See Lynch v. Warwick*, Cal.Rptr.2d 391, 393-97 (Cal. Ct. App. 2002).

2. *Consequences of An Exoneration Rule.*

Unfortunately, those states that have adopted an exoneration rule have decided to look the other way when it comes to criminal defense attorney malpractice, which is not without consequences.

> The ramifications of the [Kansas Supreme Court's decision in *Canaan*] might be better characterized as the incompetent criminal lawyer defense act – and the more incompetent, the stronger the defense. If a criminal lawyer can bungle a case sufficiently so that his client will never get out of prison, the attorney can never be responsible for malpractice.

Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App. 2000) (Grant, J., concurring).

An "exoneration" rule also ignores malpractice that leads to more serious convictions, as well as plea bargain opportunities lost because of attorney negligence.

> The inequity of requiring a plaintiff to obtain a reversal of his or her conviction before bringing a malpractice action is apparent from the facts in the present case. Krahn's claim is based in part on [her attorney's] alleged failure to communicate the prosecutor's offer. Consequently, Krahn was forced into a situation of having to plead to a more serious charge or risk a still greater conviction and sentence. Krahn may have made a valid plea on the day of

> trial, but she would have been better served had she accepted the earlier bargain. *As aptly stated by the court of appeals, the injury in such a situation is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record. The injury is not the penalty ultimately imposed by the commission, but the expenses involved in rectifying [the attorney's] failure.*

Krahn v. Kinney, 438 N.E.2d 1058, 1061 (Ohio 1989) (emphasis added).

Instead of addressing the admittedly complex issue of criminal defense lawyer malpractice, most states have chosen to avoid the issue, which does nothing to address the problem and "simply transfers the burdens of our troubled criminal justice system onto the backs of its weakest members – indigent criminal defendants." Harold H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent Defense Crisis,* 45 Duke L.J. 783, 784 (Feb. 1996).

A remarkable analysis of the unfairness of and the inherent flaws associated with an "exoneration" rule can be found in Justice Unis' special concurring opinion in *Stevens v. Bispham*, 851 P.2d 556, 566-579 (Or. 1993). In that case, Stevens was charged with robbery and various other crimes. He pleaded not guilty at his arraignment and the trial court appointed the defendant attorney to represent him. *Id.* at 58. Stevens and his wife insisted that on the day of the crime they were elsewhere and gave the attorney the names of three people who might be able to verify their alibi.

The attorney obtained approval from the court to hire an investigator and, because of prior mental problems, to also have Stevens examined by a psychiatrist to determine if he was

competent to aid and assist in his defense. "Thereafter, however, [the attorney] neither hired an investigator nor had a psychiatric evaluation performed. Defendant also made no attempt to interview any of the three witnesses." *Id.*

Two days before trial, the attorney told Stevens that the state had a strong case and he thought Stevens would be convicted. The attorney also told Stevens that the judge would probably give him a lighter sentence if he pleaded no-contest than if he were to be convicted following a jury trial. Following the attorney's advice, Stevens withdrew his not guilty plea and entered a no-contest plea to robbery and was sentenced to eight and a half years in prison. After spending about a year in prison, another person came forward and confessed to the crime. Stevens then sued his former criminal defense attorney for legal malpractice.

On appeal, the issue before the Oregon Supreme Court was: "At what point does the statute of limitations for legal malpractice run with respect to a lawyer's defense of a client who has been convicted in a criminal case?" *Id.* at 557. The Oregon Supreme Court held that before a person convicted of a criminal offense may bring a legal malpractice action against that person's criminal defense counsel, "the person must, in addition to alleging duty, its breach, and causation, allege 'harm' in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief, or otherwise." In other words, the Oregon Supreme Court determined that a person wrongfully convicted of a crime suffers no "harm" for purposes of bringing a legal malpractice action unless and until they obtain reversal of the conviction. *Id.* Justice Unis had this to say about the court's "no relief – no harm" rule.

> *I believe that plaintiff and other persons convicted of a crime will be astonished to learn that, even if*

> *their lawyers' negligence resulted in their being wrongfully convicted and imprisoned, they were not harmed when they were wrongfully convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated.* [Citation omitted]. Such persons will be no less astonished because of the majority's insistence that its rule is simply a legal definition of harm (*i.e.*, a legal fiction). Such attempts to divorce the law from reality should be avoided.

Id. at 566 (emphasis added).

* * *

> The problem created by the majority's rule can be compounded. A criminal defendant may (1) be wrongfully convicted at trial and imprisoned because of ineffective assistance of trial counsel; (2) lose on appeal because of ineffective assistance of appellate counsel; and (3) lose on post-conviction relief proceedings because of ineffective assistance of post-conviction relief counsel, and have no other legal recourse with respect to that conviction. [Citation omitted]. Today, the majority decides that the cumulative effect of all of this legal malpractice is that the criminal defendant has not even been harmed and, thus, has no claim against any of the lawyers whose representation was negligent and resulted in the wrongful conviction and continued imprisonment.

Id. at 576.

CONCLUSION

This case presents a question of exceptional importance – whether a person harmed by the negligence of a criminal defense attorney may seek compensation for his or her injuries in the form of money damages. Criminal defendants, ignorant of the law, literally place their liberty and lives in the hands of criminal defense attorneys. When criminal defense attorneys fail to use reasonable and ordinary care representing their clients, their clients' liberty and lives can be lost. Recourse in the form of money damages must be available to hold negligent attorneys responsible for their conduct. Granting blanket immunity to criminal defense attorneys via an exoneration rule unconstitutionally prevents criminal plaintiffs from seeking redress for injuries caused by legal malpractice in violation of the Fourteenth Amendment's due process clause. Accordingly, Canaan respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF KANSAS FILED JULY 18, 2003

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 89,023

MARVIN L. CANAAN,

Appellant,

v.

MICHAEL BARTEE, D. ALLEN BUSH, MARY CURTIS, AND KELLY JERNIGAN,

Appellees.

* * *

Appeal from Johnson County, Kansas, district court, STEVE LEBEN, judge. Opinion filed July 18, 2003. Affirmed in part and reversed in part

The opinion of the court was delivered by

LUCKERT, J.: This case presents the issue of whether a criminal defendant must obtain postconviction relief in order to maintain a legal malpractice action against his or her defense attorneys. Marvin Canaan, after being convicted of first- degree murder and other crimes and sentenced to life in prison, sued his court-appointed defense attorneys and their legal investigator for legal malpractice. The district court

granted summary judgment for the defendants, ruling that Kansas should require exoneration by postconviction relief as a prerequisite to a legal malpractice claim arising out of a criminal proceeding. The district court also denied Canaan the amount of attorney's fees he requested after defendants failed to comply with discovery requests. Canaan appealed.

Along with a large majority of courts to address this issue, we adopt the rule that a person convicted in a criminal action must obtain postconviction relief before maintaining an action alleging malpractice against his former criminal defense attorneys. Because Canaan had not obtained such relief, summary judgment was appropriate. We affirm the district court's decision on this issue.

We also affirm the district court's decision to not assess monetary sanctions, other than attorney fees, for defendants' failure to comply with discovery. However, we reverse the district court's decision requiring defendants to pay $1,500 in attorney fees, finding no basis in the record to support the award.

FACTS

In November 1995, a jury in Johnson County, Kansas, convicted Marvin Canaan of first-degree murder, aggravated robbery, and aggravated burglary. This court upheld Canaan's convictions in *State v. Canaan,* 265 Kan. 835, 964 P.2d 681 (1998).

On January 5, 1998, Canaan filed a lawsuit against Michael Bartee, Kelly Jernigan, Allen Bush, and Mary Curtis.

Appendix A

Bartee and Jernigan, attorneys with the Johnson County Public Defender Office, were Canaan's trial attorneys. Bush worked as a legal investigator for the same office. Curtis, an attorney with the Appellate Defender Office, represented Canaan on direct appeal. In his petition entitled "Tort Action for Legal Malpractice," Canaan alleged that he was "provably innocent" and that he had been wrongfully convicted as a direct and proximate result of the defendants' legal malpractice. Canaan listed various causes of action including legal malpractice, intentional misrepresentation, breach of contract, breach of warranty, and fraud, all of which the district court deemed claims for legal malpractice or negligence. Canaan sought damages in excess of $50,000.

On February 14, 2000, the district court entered a default judgment against the defendants as a sanction for their failure to comply with Canaan's discovery requests despite two court orders to do so. Until that time, defendants had been represented by Assistant Attorney General James Coder. As a result of his conduct in this case, this court ordered that Coder be suspended from the practice of law for 1 year. *In re Coder,* 272 Kan. 758, 35 P.3d 853 (2001). Defendants then retained new counsel and filed a motion to set aside the default judgment. The district court denied the motion, but certified its decision for interlocutory appeal.

On appeal, this court reversed the district court's order of default judgment, ruling that the district court abused its discretion in failing to utilize lesser sanctions before entering the ultimate sanction of default judgment and in failing to set aside the default judgment based upon the defendants' excusable neglect. *Canaan v. Bartee,* 272 Kan. 720, Syl. ¶ 9, 35 P.3d 841 (2001).

After that reversal, Canaan filed a motion for monetary sanctions and award of attorney fees and costs. Defendants filed a motion for summary judgment alleging that Canaan's cause of action had not yet accrued because he had not obtained exoneration by postconviction relief, and that his claims were barred by collateral estoppel because the issue of legal malpractice had already been decided against him in a K.S.A. § 60-1507 proceeding.

On March 15, 2002, the district court granted the defendants' motion for summary judgment, agreeing with defendants' argument that exoneration by postconviction relief is an absolute prerequisite to the maintenance of a legal malpractice action arising out of a criminal proceeding. The court stated:

> "[W]e agree with defendants that the rule they seek to have applied here is the majority rule. We also agree with them that it is the ruling being adopted by most of the courts that have addressed this question in the recent past. And, most important, we agree that it is the rule that the Kansas appellate courts would and, we think, should apply."

Regarding Canaan's motion for monetary sanctions and attorney fees, the district court assessed an attorney fee award of $1,500 against defendants. That amount was based upon the 10 hours (at $150 per hour) Canaan's attorney spent reviewing the discovery responses finally provided by the defendants after the default judgment.

Appendix A

Canaan and the defendants all filed motions to amend the judgment, which the district court ruled upon in a memorandum decision filed May 23, 2002. Canaan timely appealed. Pursuant to K.S.A. § 20-3017, this court granted Canaan's motion to transfer the case from the Court of Appeals.

Simultaneous K.S.A. § 60-1507 Proceedings

While this case was proceeding, Canaan sought postconviction relief by filing a pro se K.S.A. § 60-1507 motion. Judge William Cleaver entered an order denying Canaan's motion on March 20, 2001. Canaan appealed but later dismissed his appeal in order to seek a rehearing of his K.S.A. § 60-1507 motion at the district court level. On September 3, 2002, after a hearing at which Canaan was allowed to present evidence, Judge Cleaver ruled that there was no basis for Canaan's claim of ineffective assistance of counsel and denied his K.S.A. § 60-1507 motion.

I. Did the District Court Err in Ruling that Exoneration by Postconviction Relief Is an Absolute Prerequisite to Bringing a Legal Malpractice Action Arising out of a Criminal Proceeding?

"Today, the courts generally have accepted the principle that guilt or innocence is relevant to pleading and proving a legal malpractice cause of action." 3 Mallen & Smith, Legal Malpractice § 26.3, 810 (5th ed. 2000). Recognizing the trend in case law, defendants argue, and Canaan concedes, that a majority of states addressing the issue have held that

successful postconviction relief is a prerequisite to the maintenance of a legal malpractice action arising out of criminal proceedings.

Whether a plaintiff must be exonerated in postconviction proceedings before bringing a legal malpractice action against his criminal defense attorney is an issue of first impression in Kansas. This issue presents an issue of law over which this court's review is unlimited. See *Prime v. Beta Gamma Chapter of Pi Kappa Alpha,* 273 Kan. __, __, 47 P.3d 402 (2002).

Kansas Law Regarding Legal Malpractice

Our appellate courts have stated the following requirements in regard to legal malpractice cases in general: "[I]n order to prevail on a claim of legal malpractice, a plaintiff is required to show (1) the duty of the attorney to exercise ordinary skill and knowledge, (2) a breach of that duty, (3) a causal connection between the breach of duty and the resulting injury, and (4) actual loss or damage." *Bergstrom v. Noah,* 266 Kan. 847, 874, 974 P.2d 531 (1999). In addition to those four elements, to prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error. *Webb v. Pomeroy,* 8 Kan.App.2d 246, 249, 655 P.2d 465 (1983).

Only two Kansas cases have dealt with a legal malpractice claim arising out of criminal proceedings: *Rice v. Barker & Bunch, P.C.,* 25 Kan.App.2d 797, 972 P.2d

786 (1998), and *Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112 (1984). In *Rice,* the Court of Appeals addressed a plaintiff's claim against his former attorneys seeking damages for their negligence in defending him on a murder charge. The court upheld the district court's dismissal of plaintiff's claim based upon its application of the rule that "a plaintiff in a legal malpractice case arising out of prior litigation [is required] to show that but for the negligence of the attorney-defendant, the outcome of the underlying lawsuit would have been successful." 25 Kan.App.2d at 797-98. Because Rice explicitly acknowledged making no such claim, the Court of Appeals did not discuss how this showing would be made or whether it required exoneration.

In *Bowman,* the plaintiff retained the defendant, attorney Doherty, to represent him on a charge of giving a worthless check. Although Doherty spoke with a deputy district attorney about obtaining a continuance of the matter, no continuance was arranged with the district court, and neither Bowman nor Doherty appeared in court on the scheduled date. As a result, Bowman was arrested and charged with aggravated failure to appear. Bowman eventually retained different counsel, and both of his cases "were resolved." 235 Kan. at 871-73.

Bowman then sued Doherty for legal malpractice, and a jury found Doherty to have been 50 percent at fault. Doherty appealed the jury's finding, arguing that Bowman should have been required to put on expert testimony that Doherty deviated from the appropriate standard of care. This court held that expert legal testimony was not required where the attorney's breach of duty or failure to use due care was so

clear and obvious that the trier of fact could find a deviation from the appropriate standard for an attorney by relying on its common knowledge. 235 Kan. at 879.

Canaan argues that the adoption of an exoneration rule in Kansas would render *Bowman* meaningless. He contends that the *Bowman* decision makes it clear that attorneys practicing criminal and civil law are subject to the same duty of care, and are implicitly subject to suits for money damages where the attorney's failure to exercise due care results in harm, whether that harm be a wrongful conviction, lost plea bargain opportunity, or an excessive sentence. Defendants respond that, while *Bowman* does set out the appropriate standard of care, it does not address whether exoneration is a precondition to bringing a civil malpractice action.

Defendants correctly point out that the issue of exoneration was not before the *Bowman* court. The court simply did not address whether Bowman was required to show that he had been exonerated of either the bad check charge or the failure to appear charge before bringing his legal malpractice action against Doherty. The opinion indicates Bowman's cases "were resolved" but does not state in what manner they were resolved. Contrary to Canaan's argument, *Bowman* does not stand for the premise that a plaintiff can recover against an attorney for the harm of a wrongful conviction, lost plea bargain opportunity, or excessive sentence. The alleged harm in *Bowman* was the physical and mental suffering plaintiff endured when he was arrested for failure to appear and his loss of freedom when he was jailed for several hours as a result. 235 Kan. at 872. The opinion does not indicate whether Bowman was convicted or sentenced on either charge.

Thus, we are left to decide whether we will apply the exoneration rule in legal malpractice actions in Kansas.

Decisions in Other States

As previously noted, a majority of courts considering the issue have held that a plaintiff must show exoneration by postconviction relief before he or she can sue defense lawyers: *Levine v. Kling,* 123 F.3d 580, 583 (7th Cir. 1997) (applying Illinois law); *Shaw v. State, Dept. of Admin., PDA,* 816 P.2d 1358, 1360 (Alaska 1991) (*Shaw I*); *Steele v. Kehoe,* 747 So.2d 931, 933 (Fla. 1999); *Berringer v. Steele,* 133 Md.App. 442, 484, 758 A.2d 574 (2000); *Morgano v. Smith,* 110 Nev. 1025, 1029, 879 P.2d 735 (1994); *Stevens v. Bispham,* 316 Or. 221, 238, 851 P.2d 556 (1993); *Bailey v. Tucker,* 533 Pa. 237, 251, 621 A.2d 108 (1993); *Gibson v. Trant,* 58 S.W.3d 103, 117 (Tenn. 2001); *Peeler v. Hughes & Luce,* 909 S.W.2d 494, 497-98 (Tex. 1995); and *Adkins v. Dixon,* 253 Va. 275, 281-82, 482 S.E.2d 797 (1997).

Some courts, including many which appear in the first category, hold that a plaintiff must show actual innocence. Cases supporting that proposition include *Levine,* 123 F.3d at 582; *Shaw v. State, Dept. of Admin.,* 861 P.2d 566, 572 (Alaska 1993) (*Shaw II*); *Coscia v. McKenna & Cuneo,* 25 Cal.4th 1194, 1199, 108 Cal.Rptr.2d 471, 25 P.3d 670 (2001); *Wiley v. County of San Diego,* 19 Cal.4th 532, 538, 79 Cal.Rptr.2d 672, 966 P.2d 983 (1998); *Gomez v. Peters,* 221 Ga.App. 57, 59-60, 470 S.E.2d 692 (1996); *Ray v. Stone,* 952 S.W.2d 220, 224 (Ky.App.1997); *Glenn v. Aiken,* 409 Mass. 699, 702, 569 N.E.2d 783 (1991); *Rodriguez v. Nielsen,* 259 Neb. 264, 273, 609 N.W.2d 368 (2000); *Morgano,* 110

Nev. at 1029-30; *Carmel v. Lunney,* 70 N.Y.2d 169, 173, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987); *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.,* 143 N.H. 491, 496, 727 A.2d 996 (1999); *Bailey,* 533 Pa. at 250-51; *Peeler,* 909 S.W.2d at 497-98; and *Adkins,* 253 Va. at 282.

Policy Reasons Behind the Exoneration Rule

Various policies or justifications have been stated for the exoneration rule, including: equitable principles against shifting responsibility for the consequences of the criminal's action; the paradoxical difficulties of awarding damages to a guilty person; theoretical and practical difficulties of proving causation; the potential undermining of the postconviction process if a legal malpractice action overrules the judgments entered in the postconviction proceedings; preserving judicial economy by avoiding relitigation of settled matters; creation of a bright line rule determining when the statute of limitations runs on the malpractice action; availability of alternative postconviction remedies; and the chilling effect on thorough defense lawyering. We find many of these stated reasons persuasive.

Many courts citing equitable principles as a justification for the exoneration rule express concern that a criminal defendant should not be allowed to profit from his or her own illegal conduct and find that it is improper to shift the burden of responsibility for the crime away from the criminal and to the defense attorney. *Wiley,* 19 Cal.4th at 537-48; *Mahoney,* 727 A.2d at 999; *Peeler,* 909 S.W.2d at 498. Similarly, it is stated that a criminal's conviction and

sentence are the direct consequence of the criminal behavior, regardless of any negligence by the attorney. *Wiley,* 19 Cal. 4th at 538.

As a result, allowing recovery of damages without exoneration is contrary to the fundamental principle of tort law that damages are provided only for legally protected legal interests (Restatement [Second] of Torts § 1, comment d, § 7[1] [1965]), "and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no right to that result. . . ." *Levine,* 123 F.3d at 582. Also regarding damages, the Minnesota Court of Appeals noted that "monetary remedies are inadequate to redress the harm to incarcerated criminal defendants." *Noske v. Friedberg,* 656 N.W.2d 409, 414 (Minn. App. 2003) (restating the policy arguments contained in *Steele v. Kehoe,* 747 So.2d at 933).

For similar reasons, without exoneration, it cannot be said that the attorney's actions were the proximate cause of the guilty criminal's injury. In other words, because of the antecedent criminal conduct, it cannot be said that "but for" the attorney's conduct the outcome of the criminal proceeding would differ. Thus, "without obtaining relief from the conviction or sentence, the criminal defendant's own actions must be presumed to be the proximate cause of the injury." *Noske,* 656 N.W.2d at 414; *Steele,* 747 So.2d at 933. See also *Berringer,* 758 A.2d at 597 ("If a potential criminal plaintiff is unsuccessful in obtaining relief from conviction, then it would seem that the attorney's conduct was not the proximate cause of the conviction or injury.")

Recognizing this difficulty, the Tennessee Supreme Court recently noted this was one of the most persuasive reasons supporting the exoneration rule, phrasing the issue as "the perplexing problem of how a criminal defendant could ever prove that his lawyer caused him any legally cognizable injury, and the related problem of how he could prove damages." *Gibson,* 58 S.W.3d at 111.

Also addressing the causation issue, the Texas Supreme Court held that a plaintiff convicted of a criminal offense "may negate the sole proximate cause bar to [his or her] claim for legal malpractice in connection with that conviction only if [he or she has] been exonerated on direct appeal, through postconviction relief, or otherwise." *Peeler,* 909 S.W.2d at 497-98. This is so because it is the illegal conduct of the plaintiff, rather than the attorney's negligence, that is the cause in fact of any injury flowing from the conviction, unless that conviction has been overturned. 909 S.W.2d at 498.

These problems arise in part because of the different standards of proof in criminal and civil proceedings. As one court has stated the problem, the plaintiff in a legal malpractice action "must prove by a preponderance of the evidence that, but for the negligence of his attorney, the jury could not have found him guilty beyond a reasonable doubt." *Shaw II,* 861 P.2d at 573. The Tennessee Supreme Court believed such a standard would prove unmanageable. *Gibson,* 58 S.W.3d at 111.

"The dilemma of proving causation is not simply a matter of the complexity of the task facing jurors. Rather, it highlights a basic, theoretical distinction between civil and

criminal malpractice actions. . . ." *Gibson,* 58 S.W.3d at 111. In a civil malpractice action, the focus is solely upon the attorney's negligence; in a criminal action, however, any harm suffered is principally because of the criminal's antecedent conduct. See *Levine,* 123 F.3d at 582. Thus, the California court in *Wiley* concluded that "it is not at all difficult to defend a different rule, because criminal prosecution takes place in a significantly different procedural context, 'and as a result the elements to sustain a cause of action must likewise differ.'" *Wiley,* 19 Cal.4th at 540 (quoting *Bailey,* 621 A.2d at 114).

Several courts have also noted that the criminal justice system provides its own safeguards, including postconviction proceedings, to ensure a remedy for criminal defendants who are unjustly convicted. *Noske,* 656 N.W.2d at 414; *Steele,* 747 So.2d at 933; *Gibson,* 58 S.W.3d at 112-13. It would undermine the postconviction process to allow a legal malpractice action to overrule the judgments entered in those proceedings. *Gibson,* 58 S.W.3d at 112-13.

This argument is related to another justification offered for the exoneration rule, the doctrine of collateral estoppel. Some courts have held that to allow a malpractice claim to proceed would be contrary to the doctrine of collateral estoppel. See *Schlumm v. O'Hagan,* 173 Mich.App. 345, 355, 433 N.W.2d 839 (1988); *Brewer v. Hagemann,* 771 A.2d 1030, 1033 (Me. 2001). As stated in *Griffin v. Goldenhersh,* 323 Ill. App. 3d 398, 405, 752 N.E.2d 1232 (2001): "While a legal malpractice plaintiff must prove his innocence, he is collaterally estopped from arguing facts established and issues decided in a criminal proceeding. . . . Thus, [until] a

plaintiff's conviction is overturned, the plaintiff is collaterally estopped from arguing his innocence, leaving him with no cause of action."

Along the same lines, courts have explained that the exoneration rule promotes judicial economy because requiring a plaintiff to obtain postconviction relief will allow the judgment in the postconviction proceeding to have collateral estoppel effect on any later malpractice action. *Shaw I,* 816 P.2d at 1361; *Noske,* 656 N.W.2d at 414; *Steele v. Kehoe,* 747 So.2d at 933; *Gibson,* 58 S.W.3d at 112-13. Application of the doctrine promotes finality, conserves judicial resources, and prevents inconsistent decisions. *Gibson,* 58 S.W.3d at 113.

Yet another reason cited in support of the exoneration rule is the encouragement of thorough representation of criminal defendants. Defense attorneys should not have to spend time and energy in "defensive" lawyering to avoid potential malpractice claims. Further, it is important to ensure an adequate supply of lawyers willing to undertake the representation of indigent defendants. *Gibson,* 58 S.W.3d at 115-16; *Wiley,* 19 Cal.4th at 544-45.

Minority view

Not all courts have adopted the exoneration rule. Courts in Alabama (*Mylar v. Wilkinson,* 435 So.2d 1237 [Ala. 1983]) Indiana (*Silvers v. Brodeur,* 682 N.E.2d 811, 818 [Ind.App. 1997]), Michigan (*Gebhardt v. O'Rourke,* 444 Mich. 535, 548, 510 N.W.2d 900 [1994]), New Mexico *(Duncan v. Campbell,* 123 N.M. 181, 186, 936 P.2d 863 [Ct.App. 1997]),

and Ohio (*Krahn v. Kinney,* 43 Ohio St.3d 103, 105, 538 N.E.2d 1058 [1989]) have criticized or rejected the exoneration rule, often in cases where a plaintiff had obtained postconviction relief.

The Missouri Supreme Court in *Jepson v. Stubbs,* 555 S.W.2d 307, 313-14 (Mo. 1977), considered the plaintiff's argument that his cause of action for legal malpractice did not accrue until his conviction was set aside in postconviction proceedings. The court rejected that argument and found that the statute of limitations had run. Interestingly, despite the Missouri Supreme Court's ruling in *Jepson,* the Missouri Court of Appeals has held that a plaintiff's guilty plea operated to preclude him or her, pursuant to the principle of collateral estoppel, from bringing a legal malpractice suit against a public defender who had represented him or her. *State ex rel. O'Blennis v. Adolf,* 691 S.W.2d 498, 503 (Mo. App. 1985). The court distinguished *Jepson* on the basis of whether the facts admitted by the plea were legally sufficient to support the conviction.

Relying upon these cases and particularly the reasoning of *Krahn v. Kinney,* Canaan argues we should reject the exoneration rule.

First, Canaan argues that legal malpractice should be viewed in the same manner as a lost chance for a better recovery in medical malpractice. The *Krahn* court, in considering whether an attorney could be negligent for failing to advise his or her client of a plea offer, stated: "[T]he injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal

record.'" 43 Ohio St.3d at 106. Building upon this holding, Canaan argues that Krahn's "lost opportunity" to minimize her criminal record is analogous to a plaintiff's loss of chance of a better recovery in a medical malpractice case. See *Delaney v. Cade,* 255 Kan. 199, 873 P.2d 175 (1994). The public policy reason for the loss of chance theory is that, if such claims were barred, doctors would be free of liability for even the grossest malpractice in treating seriously ill or injured patients. Canaan argues the same rationale applies here. A criminal defendant's "preexisting injury" is the charge against him, and the attorney's job is to minimize the consequences of that charge. If an attorney negligently fails to communicate a plea offer or immunity offer, the defendant has been harmed by losing the chance for a better outcome. Preventing the criminal defendant from bringing a malpractice action, therefore, "declares open season on criminal defendants" and allows defense attorneys to remain free of liability for even the grossest malpractice.

This argument does not survive when weighed against the public policy reasons against allowing a criminal defendant to sue his defense attorney as set out by the cases adopting the exoneration rule. As stated in *Peeler:* "The lost opportunity of an admittedly guilty person to escape prosecution because of her lawyer's negligence does not override the public policy against shifting the consequences of a crime to a third party." 909 S.W.2d at 498. Canaan's argument is directly at odds with the idea that a criminal defendant should not be able to shift responsibility onto his or her defense attorney when it is the accused's own criminal behavior that is the direct and proximate cause of the conviction. If accepted, Canaan's position would allow

convicted criminals to sue their defense attorneys for damages any time they believed their attorney should have asked for a lesser included instruction, for example. Canaan's argument that defense attorneys would escape liability for malpractice also ignores the fact that all attorneys are subject to disciplinary rules requiring them to represent their clients in a diligent and competent manner.

Canaan also cites *Krahn* to support his argument that the collateral estoppel doctrine does not justify application of the exoneration rule and his argument that collateral estoppel should not apply because an ineffective assistance of counsel claim is a different cause of action from a legal malpractice action. Canaan quotes the following language:

> "An action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice. A claim of ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction. Legal malpractice is a common law action, grounded in tort, which seeks monetary damages. The proof of either of these two causes of action does not necessarily establish the other." 43 Ohio St.3d at 107.

However, the *Krahn* court did recognize that collateral estoppel might preclude further litigation of a claim of ineffective assistance of counsel where the issue had been raised and determined in a prior criminal action. The court simply found that the doctrine did not apply on the facts of

that case where Krahn's previous motion to vacate her conviction had been denied because she failed to establish that her guilty plea was not knowingly, voluntarily, and intelligently entered. But the resolution of that issue did not determine her malpractice claim which was based upon counsel's failure to communicate a plea bargain offer. 43 Ohio St.3d at 107.

In a related argument, Canaan contends that postconviction remedies are inadequate to rectify the harm caused by ineffective assistance of counsel. Defendants characterize Canaan's argument as one contending that the standards in civil malpractice and ineffective assistance of counsel claims are vastly different. Defendants respond that the standards are similar and that postconviction remedies are the proper avenue for addressing any lapse in defense counsel's conduct.

In order to obtain reversal of a conviction based upon an ineffective assistance of counsel claim, a criminal defendant must show that "(1) counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the defense, which requires showing counsel's errors were so serious they deprived defendant of a fair trial. *State v. Rice,* 261 Kan. 567, 598-99, 932 P.2d 981 (1997)." *State v. Thomas,* 26 Kan.App.2d 728, 730, 993 P.2d 1249 (1999). Regarding the required showing of prejudice, "the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Graham v. State,* 263 Kan. 742, 755, 952 P.2d 1266 (1998).

By contrast, in a legal malpractice action, a plaintiff must show that his attorney failed to use that degree of learning, skill, and care that a reasonably competent lawyer would use in similar circumstances. See *Bowman v. Doherty,* 235 Kan. 870, 878, 686 P.2d 112 (1984). Defendants contend that both types of cases judge attorney performance using the same "reasonable competence" standard. In *Schoonover v. State,* 2 Kan.App.2d 481, 582 P.2d 292 (1978), the court noted that the "reasonably competent" standard that is applied to claims of ineffective assistance of counsel is shorthand for the standards and rules imposed by the Code of Professional Responsibility. Additionally, it noted that the reasonably competent standard "also, we suppose, establishes a standard for malpractice, since lawyers, like other professionals, are required to have and exercise the learning and skill ordinarily possessed by members of their profession in the community." 21 Kan.App.2d at 488.

As to the prejudice aspect of the standard, a plaintiff in a legal malpractice case must show that but for the negligence of the attorney, the outcome of the underlying lawsuit would have been successful. *Webb v. Pomeroy,* 8 Kan.App.2d 246, 249, 655 P.2d 465 (1983). This is similar to the requirement that a criminal defendant claiming ineffective assistance of counsel show that, but for counsel's errors, the result of the proceeding would have been different. We recognize that certain presumptions do apply in an ineffective assistance of

counsel case. See *Baker v. State,* 243 Kan. 1, Syl. ¶ 3,755 P.2d 493 (1988). This distinction is one of the more troubling aspects of application of the exoneration rule.

However, we believe this is offset by the adequacy of postconviction relief, a remedy unique to the criminal case. 3 Mallen & Smith, Legal Malpractice § 26.3,819 (5th ed. 2000). As stated in *Wiley:*

> "In such instances of attorney negligence, postconviction relief will provide what competent representation should have afforded in the first instance: dismissal of the charges, a reduced sentence, an advantageous plea bargain. In the case of trial error, the remedy will be a new trial. If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties. [Citations omitted.] Those courts analogizing to civil actions have not considered the implications of postconviction relief for ineffective assistance of counsel. (See *Stevens v. Bispham, supra,* 851 P.2d at p. 565.) Given that availability, it is inimical to sound public policy to afford a civil remedy, which in some cases would provide further boon to defendants already evading just punishment on 'legal technicalities.'" 19 Cal.4th at 542-43.

Canaan also points out that difficulty in applying the statute of limitations has often led courts to reject the

exoneration rule. Application of the statute of limitations in legal malpractice cases is troublesome, regardless of the context in which it arises. We have recognized a variety of theories which determine when a cause of action for legal malpractice accrues and when the statute of limitations begins to run and stated that determination of which theory applies depends upon the facts and circumstances of each case. *Pancake House, Inc. v. Redmond,* 239 Kan. 83, 87, 716 P.2d 575 (1986). In *Dearborn Animal Clinic, P.A. v. Wilson,* 248 Kan. 257, 270, 806 P.2d 997 (1991), we recognized that, in some cases, accrual of the cause of action is dependent upon resolution of underlying litigation. Such civil cases would share many of the problems inherent in adoption of the exoneration rule. These problems do not outweigh what we view as the sounder policy and rationale of the exoneration rule.

Finally, Canaan argues that an exoneration rule violates his constitutional right to seek remedy by court action for harm caused by attorney malpractice. He cites Section 18 of the Kansas Constitution Bill of Rights which provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." He also cites the Fourteenth Amendment to the United States Constitution Due Process Clause.

Defendants respond that the exoneration rule would not deny criminal defendants access to the courts, and that such defendants may seek postconviction relief pursuant to K.S.A. § 60-1507.

A similar argument was raised and rejected in *Peeler v. Hughes & Luce,* 909 S.W.2d at 499. There, the court found that the "open courts" provision of the Texas Constitution, which provides a "remedy by due course of law" just as the Kansas Constitution does, applied only to statutory restrictions of a cognizable common law cause of action. Because Peeler was not challenging a legislative act, her "open courts" challenge was inapplicable.

Furthermore, the adoption of the exoneration rule could be construed simply as a recognition that a plaintiff has no cause of action until he or she can establish the causation element of his or her claim. In other words, until a plaintiff has been exonerated, his or her criminal conduct and not his or her attorney's negligence is the proximate cause of his or her incarceration. Under this theory, the plaintiff has no cause of action deserving of constitutional protection until exoneration occurs. We find no merit in Canaan's constitutional challenge to the exoneration rule.

Application to Canaan's Case

After consideration of these authorities, the varying policy justifications, and the shortcomings of the various approaches, we find the majority view persuasive. We hold that before Canaan may sue his attorneys for legal malpractice he must obtain postconviction relief.

Because of the procedural posture of this case, we need not address whether a plaintiff must prove actual innocence. Canaan, through his action pursuant to K.S.A. § 60-1507, attempted to establish ineffective assistance of counsel.

His petition was denied. Thus, Canaan has not been successful in obtaining any form of postconviction relief.

Characterization of Canaan's Claims

Canaan argues that even if we adopt the exoneration rule, the district court erred in granting summary judgment because defendants' motion only sought judgment on his legal malpractice claims, and not his additional claims of negligence, breach of express contract, breach of implied contract, breach of express warranty, breach of implied warranty, intentional misrepresentation, and fraud.

Defendants respond that the district court rejected this argument on the grounds that it was one of the uncontroverted facts alleged by defendants in their summary judgment motion that the court had deemed all of Canaan's various causes of action to be claims for legal malpractice. Canaan admitted that allegation by failing to dispute it in his response to defendants' motion. In so ruling, the district court reiterated its previous ruling that "'the gravamen of this lawsuit is that his appointed public defenders and their investigator were negligent in providing services to him.'" The court refused to allow Canaan to obtain "a tactical legal advantage by recharacterizing a claim as something beyond its true essence."

Canaan argues that the problem with the district court's decision is that its previous ruling regarding Canaan's various causes of action was implicitly reversed by this court in *Canaan v. Bartee,* 272 Kan. 720, 35 P.3d 841 (2001). Canaan further disagrees with the district court's characterization of his claims.

Appendix A

In *Canaan v. Bartee,* this court did not review the district court's characterization of Canaan's various causes of action as legal malpractice claims. Furthermore, the district court's ruling was correct.

> "When there is both a contractual relationship and a relationship that gives rise to a legal duty, such as the attorney-client relationship, the breach of that duty and not of the contract itself gives rise to a tort action. . . . If the gravamen of the action is a breach of the legal duty and not of the contract itself, the action is in tort." *Hunt v. KMG Main Hurdman,* 17 Kan.App.2d 418, Syl. ¶¶ 1, 3, 839 P.2d 45 (1992).

See also *Bonin v. Vannaman,* 261 Kan. 199, 210, 929 P.2d 754 (1996) (while alleged conduct fulfilled all elements of fraud, conduct was also proscribed by duty imposed by law; breach of duty is malpractice and action for damages is one in tort).

Canaan also argues that his legal malpractice claims do not apply to Bush, who is not an attorney. In regard to the argument that his other claims against Bush would remain, regardless of the court's adoption of an exoneration rule, the district court noted that Bush was an agent of the attorney defendants. The district court stated: "There is no reason to allow a claim to proceed against the agent when, for reasons of policy, it is not allowed to proceed against [the] principal."

Canaan offers no legal analysis of why the district court's decision on this issue was in error. When a point is

incidentally raised but not argued, it is deemed abandoned. *Campbell v. City of Leavenworth,* 28 Kan.App.2d 120, 126, 13 P.3d 917 (2000), *rev. denied* 270 Kan. 897 (2001). Furthermore, Canaan's contention is without merit. The Court of Appeals rejected a similar argument in *Rice v. Barker & Bunch, P.C.,* 25 Kan.App.2d 797, 972 P.2d 786 (1998). In that case, the court reiterated the rule that a plaintiff in a legal malpractice case arising out of prior litigation must show that "but for" the negligence of the attorney- defendant, the outcome of the underlying lawsuit would have been successful. The plaintiff argued that the "but for" causation rule applied only to attorneys. The court rejected the argument, finding "no reason for applying a different rule to a person performing investigative work for an attorney in connection with the attorney's representation of the plaintiff simply because that person is not an attorney." 25 Kan.App.2d at 798.

II. Did the District Court Abuse its Discretion in Denying Canaan's Motion for a Monetary Sanction Against Assistant Attorney General James Coder and the Kansas Attorney General's Office?

Canaan argues that the district court abused its discretion in denying his motion for a monetary sanction against defendants' former attorney, James Coder, and his employer, the Kansas Attorney General's Office. Defendants respond that Canaan has failed to establish that the district court abused its discretion.

Although Canaan's initial motion requested a monetary sanction *and* award of attorney fees and costs, at the hearing

on the motion Canaan's attorney argued the motion as one requesting an award of attorney fees *as* a monetary sanction. Most of the parties' argument on the motion related to what portion of the attorney fees was actually caused by the defendants' failure to comply with discovery orders.

The district court also treated Canaan's argument as a single request for attorney fees and costs *as* a monetary sanction. The district court granted Canaan's motion in part, by ordering that defendants pay $1,500 in attorney fees.

Canaan then filed a motion to amend the judgment, asking that the district court reconsider its decision and impose a monetary sanction of $100,000, attorney fees of $30,000, and costs of $2,379.96. Although this motion more clearly requested both a monetary sanction and attorney fees and costs, the district court did not treat the issue any differently. It found that Canaan's motion requested the court to reconsider its previous rulings on the amount of sanctions. Because Canaan did not argue there was any intervening change in the law or any new evidence which should be considered, and because the court had already considered and rejected Canaan's "but for" argument regarding causation, the court denied the motion.

Standard of Review

This court has reviewed the denial of a K.S.A. § 60-259(f) motion to alter and amend under an abuse of discretion standard. *Subway Restaurants, Inc. v. Kessler,* 266 Kan. 433, 441, 970 P.2d 526 (1998). The award of sanctions, including attorney fees, for discovery violations is also reviewed using

an abuse of discretion standard. *In re Tax Appeal of American Restaurant Operations,* 264 Kan. 518, 538, 957 P.2d 473 (1998). "'A court abuses its discretion when it reaches a decision with which no reasonable person could agree. If any reasonable person could agree, the decision must be affirmed.'" 264 Kan. at 538-39 (quoting *City of Arkansas City v. Anderson,* 19 Kan.App.2d 344, 349, 869 P.2d 244, *rev. denied* 255 Kan. 1000 [(1994]).

Monetary Sanction

K.S.A.2002 Supp. 60-237, the statute authorizing an award of attorney fees, reads in relevant part:

> "(b)(2) If a party . . . fails to obey an order to provide or permit discovery ... the judge before whom the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> "In lieu of any of the foregoing orders or in addition thereto, the judge shall require the party failing to obey the order or the attorney advising such party or both to pay the *reasonable expenses, including attorney fees,* caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (Emphasis added.)

In *Canaan v. Bartee,* this court stated that the sanction should be designed to accomplish the objects of discovery rather than for the purpose of punishment. 272 Kan. at 728. A pure monetary sanction of $100,000, when unrelated to any actual costs incurred as a result of the misconduct, could only serve a punitive purpose. The district court's denial of such a sanction cannot be said to be an abuse of discretion.

Canaan also complains that the district court improperly substituted the disciplinary action against Coder for monetary sanctions. This argument mischaracterizes the district court's ruling. In deciding the amount of attorney fees to award, the district court noted that this court had previously sanctioned Coder for his behavior by suspending him from the practice of law for 1 year. The district court stated that consideration of the disciplinary action was appropriate, and considering both the disciplinary sanction and the monetary sanction of attorney fees in combination, the court concluded: "[A]n appropriate sanction has now been levied." Again, the district court's consideration of the disciplinary sanction does not show an abuse of discretion.

III. Did the District Court Abuse its Discretion in Awarding Canaan $1,500 in Attorney Fees?

Canaan next argues that the district court abused its discretion in refusing to award the full amount of attorney fees and "case-related expenses" that he requested. Defendants again respond that Canaan has failed to establish that the district court abused its discretion.

Appendix A

The district court noted that K.S.A.2002 Supp. 60-237(b)(2) authorizes an award of those attorney fees "caused by the failure" of the defendants to obey discovery orders. The court stated:

> "Plaintiff seeks recovery of all of the attorney fees and costs incurred since he obtained counsel. Such an award would clearly be improper. First, such an award would require that the defendants pay all of the plaintiff's attorney fees on appeal. Yet the defendants won the appeal and the Kansas Supreme Court assessed the costs of the appeal against the plaintiff. This court certainly cannot reverse the order of a superior court, whether directly or indirectly. Second, there is no real relationship between the failures of the defendants in discovery prior to February 14, 2000 and the majority of the fees incurred by the plaintiff, which were not incurred until after he retained counsel on or about April 15, 2000. Plaintiff argues that 'but for' the failures of the defendants, a default judgment would not have been entered; 'but for' that default judgment, counsel might not have entered the case; 'but for' that default judgment, an appeal would not have been needed; 'but for' that default judgment, most of the fees would not have been incurred. The use of 'but for' reasoning here simply makes no sense. The simple fact is that the entry of the default judgment was an abuse of discretion by this court. No fees the plaintiff incurred as a result of that error by this court should be assessed against the defendants, even

> though they would not have been incurred 'but for' the discovery failures and the entry of a default judgment."

The district court also noted that the majority of the time Canaan's counsel spent on the case was devoted to handling the appeal before this court and not to discovery matters. The district court did conclude that Canaan was entitled to recover "attorney fees related to reviewing the discovery responses finally provided by the defendants (which were provided after the court's February 14, 2000 decision) and fees related to reasonably following up on those responses." The district court then awarded $1,500 in attorney fees, based upon the 10 hours (at $150 per hour) of attorney time that fell into that category.

Canaan's primary argument is that the district court reached an erroneous conclusion regarding the amount of attorney fees that were incurred as a direct result of James Coder's failure to comply with discovery orders. Canaan argues that he is entitled to recover attorney fees incurred from the date he retained counsel through December 7, 2001, the date this court entered its opinion in *Canaan v. Bartee*, 272 Kan. 720. Specifically, he contends that any attorney fees incurred during the appeal process were a direct result of Coder's conduct.

Essentially, Canaan is making the same "but for" argument rejected by the district court. Although it is technically true that the appeal would not have been necessary "but for" the default judgment, and the default judgment would not have been entered "but for" Coder's failure to

comply with discovery orders, it does not follow that Coder's failure caused the appeal. In essence, the district court found that neither Coder nor the defendants should be held responsible for the district court's abuse of discretion in entering a default judgment. In other words, it was the district court's erroneous entry of the default judgment, and not Coder's misconduct, that was the direct cause of the appeal and any related attorney fees.

The district court's reasoning is sound.

Canaan also asserts that he returned the $1,500 award of attorney fees because he believed that reviewing the discovery documents was not a task "caused by" Coder's failure to obey discovery orders. We agree that there was no basis for the $1,500 amount.

The district court recognized that K.S.A.2002 Supp. 60-237(b)(2) specifically authorizes only "reasonable expenses, including attorney fees, *caused by the failure*" to obey discovery orders. (Emphasis added.) The district court cited *Metal Marketplace v. United Parcel Service,* 733 F. Supp. 976 (E.D. Pa. 1990), as authority for its conclusion that plaintiff was entitled to recover attorney fees related to reviewing the discovery responses finally provided by defendants and fees related to following up on those responses. In *Metal Marketplace,* the court applied Federal Rule of Civil Procedure 37(b)(2) in awarding expenses incurred because of defense counsel's trip to the plaintiff's

office to locate documents not produced pursuant to a discovery order. The court concluded that

> "but for plaintiff's wanton failure to sift through its own records and produce these 70 documents, defense counsel would not have needed to undertake and would not have undertaken this effort. *The court will not require plaintiff to pay for all hours expended by counsel since some of them were spent reviewing and copying the relevant documents. This is something that defense counsel would have done had the documents been timely and properly produced.*" (Emphasis added.) 733 F. Supp. at 982.

The authority cited by the district court does not support its position. According to *Metal Marketplace,* it was not appropriate for the court to award attorney fees for time spent reviewing discovery documents which counsel would have done in any case. During the hearing of this matter, the district court questioned whether the time Canaan's counsel spent "supervising the turnover of those materials and confirming that they had been fully produced" might be "appropriately considered caused by the failure." Although time spent insuring that discovery responses were in full compliance, after a previous failure to comply, might arguably be time spent as a result of that failure, the billing records provided by Canaan's counsel do not contain specific enough information to draw such a conclusion.

The record does not support the district court's finding that Canaan's attorney spent 10 hours reviewing discovery

responses. There is only one entry in the attorney's billing records which specifically refers to discovery responses. That entry, made on June 8, 2002, indicates that the attorney spent 3.75 hours reviewing Kelly Jernigan's discovery responses. Only two other entries mention discovery at all, and possibly do not refer to the discovery responses referred to by the district court. An entry on May 3, 2000, shows that the attorney spent .5 hours writing a letter regarding serving discovery and an entry on May 10, 2002, shows that the attorney spent 2.70 hours drafting "discovery requests (RFAs and ROGs)."

The district court did not state which entries in the billing records it considered in arriving at its total of 10 hours, and a review of those records does not reveal any way of reaching that total. Because the district court's ruling awarded attorney fees that were not incurred as a direct result of Coder's failure to comply with discovery orders, and because its total of 10 hours of attorney time cannot be accounted for on this record, the court's decision was an abuse of discretion. See *Locke v. Kansas Fire & Cas. Co.*, 8 Kan.App.2d 678, 683, 665 P.2d 776 (1983) (abuse of discretion where no evidence in the record to support finding of proper fees and expenses incurred by defendants and $4,517.56 was an amount "far beyond reasonable expenses and fees which may have been caused by plaintiff's failure to attend his deposition").

That still leaves the question of what attorney fees were reasonable in this case, if any. This court found no abuse of discretion in an award of attorney fees and costs related to a motion to compel discovery under K.S.A. § 60-237(a) in *In re Tax Appeal of American Restaurant Operations,*

264 Kan. at 539-541, 957 P.2d 473. In this case, however, Canaan filed his motions to compel discovery pro se and did not retain counsel until the district court entered a default judgment in his favor in April 2000. Thus, he could have had no attorney fees in connection with any motion to compel. In fact, all of Canaan's unsuccessful attempts to obtain discovery occurred before he retained counsel.

It appears from the record in this case that none of the attorney fees can be said to have been caused by Coder's failure to comply with discovery orders. Perhaps Canaan incurred some expenses himself in filing motions to compel discovery, but no evidence was offered on that point.

Both Canaan and defendants filed motions to amend the judgment, asking that the award of attorney fees be assessed only against Coder and the Attorney General's Office, as originally requested by the defendant. We need not address this issue given our determination that it was an abuse of discretion to award this amount.

Affirmed in part and reversed in part.

ABBOTT, J., not participating.

BRAZIL, S.J., assigned.

APPENDIX B — MEMORANDUM DECISION OF THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS CIVIL COURT DEPARTMENT FILED MARCH 15, 2002

IN THE DISTRICT COURT OF JOHNSON
COUNTY, KANSAS
CIVIL COURT DEPARTMENT

Case No. 98C102
Div. No. 8

MARVIN L. CANAAN,

Plaintiff,

vs.

MICHAEL BARTEE, *et al.*,

Defendants.

MEMORANDUM DECISION

This case is before the court on several motions. The court's previous decision granting a default judgment to the plaintiff was reversed by the Kansas Supreme Court,[1] which determined that entry of a default judgment was too harsh a sanction for the conduct found here. The first motion before the court is plaintiff's motion for monetary sanctions in lieu of the default judgment that was previously granted but set aside on appeal. The second motion is defendants'

1. __ Kan. __, 35 P.3d 841 (2001).

joint motion for summary judgment, which argues that a cause of action for legal malpractice against a criminal defense attorney should not be allowed unless the convicted defendant is first exonerated in other legal proceedings. In addition to those motions, defendants have moved for reconsideration of the court's prior order denying permission to withdraw admissions, and defendant Bush has asked for leave to file a second amended answer. We will address these motions in order.

Sanctions

The question of the appropriate sanction for the conduct found in this case is a difficult one. We have previously detailed that conduct and the standards applicable in determining an appropriate sanction.[2] The Kansas Supreme Court recognized that conduct meriting sanctions had occurred and cited similar legal standards, but it unanimously concluded that our entry of a default judgment was an abuse of discretion. Its decision indicates that there was an "alternative sanction[] sufficient to protect" the plaintiff on account of the defendants' failures in discovery, but left open the question of what the adequate alternative sanction might be.

On remand, the plaintiff, through his motion, seeks only a monetary sanction. K.S.A. § 60-237(b)(2) authorizes award of attorney fees "caused by the failure to obey" discovery orders as a sanction. Plaintiff seeks recovery of all of the attorney fees and costs incurred since he obtained counsel.

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2. Mem. Dec., Feb. 14, 2000.

Such an award would clearly be improper. First, such an award would require that the defendants pay all of the plaintiff's attorney fees on appeal. Yet the defendants won the appeal and the Kansas Supreme Court assessed the costs of the appeal against the plaintiff. This court certainly cannot reverse the order of a superior court, whether directly or indirectly. Second, there is no real relationship between the failures of the defendants in discovery prior to February 14, 2000 and the majority of the fees incurred by the plaintiff, which were not incurred until after he retained counsel on or about April 15, 2000. Plaintiff argues that "but for" the failures of the defendants, a default judgment would not have been entered; "but for" that default judgment, counsel might not have entered the case; "but for" that default judgment, an appeal would not have been needed; "but for" that default judgment, most of the fees would not have been incurred. The use of "but for" reasoning here simply makes no sense. The simple fact is that the entry of the default judgment was an abuse of discretion by this court. No fees the plaintiff incurred as a result of that error by this court should be assessed against the defendants, even though they would not have been incurred "but for" the discovery failures and the entry of a default judgment.

So we are left with the question of what the appropriate sanction should be. Plaintiff has limited the request to one for a monetary sanction, and we will limit our consideration to what has been requested. A review of the billing records provided by plaintiff's counsel demonstrates that the vast majority of the time spent by counsel was devoted to handling the appeal before the Kansas Supreme Court, not to matters directly related to the discovery issues. We conclude,

however, that the plaintiff should be entitled to recover attorney fees related to reviewing the discovery responses finally provided by the defendants (which were provided after the court's February 14, 2000 decision) and fees related to reasonably following up on those responses.[3] Our review of the billing records indicates that approximately 10 hours of attorney time can reasonably be said to fall into that category. Accordingly, we award 10 hours of time at counsel's regular hourly rate of $150 per hour, for a total fee award of $1,500.

We will assess that fee award against the defendants. Their former attorney was not notified either by the parties or by the court of the hearing held this February regarding the plaintiff's motion for monetary sanctions. It would not be appropriate to enter that sanction against him without notice or an opportunity to be heard. In addition, although the defendants correctly note in their brief on the sanctions issue that the Kansas Supreme Court found that defendants' conduct amounted only to "excusable neglect" and not reckless or willful indifference, the defendants were neglectful and not wholly blameless.

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3. *See, e.g., Metal Marketplace, Inc. v. United Parcel Serv., Inc.*, 733 F. Supp. 976 (E.D. Pa. 1990) (attorney fees awarded for trip to opposing party's office to locate documents not produced pursuant to discovery order). We note that the *Metal Marketplace* court withdrew its original opinion and replaced it after it learned some of the facts in the original opinion were in error. Shepherd's citation service indicates that the opinion cited here from 733 F. Supp. was withdrawn. In fact, however, the opinion as ultimately published is as it was amended by the court and remains good law that has been cited by several other courts thereafter.

Appendix B

Although plaintiff has sought only a monetary fee award, we believe that defendants are correct that the sanctions levied by the attorney disciplinary system against the attorney who formerly represented defendants are appropriately considered at this point on the question of whether an adequate sanction has been entered. Attorney Coder has been suspended from the practice of law for one year based solely on his handling of the case before this court.[4] In combination with the monetary sanction entered above, we conclude that an appropriate sanction has now been levied.

Summary Judgment

Defendants' motion sets forth a short list of uncontroverted facts, most of which were admitted by plaintiff. The facts relevant to this motion are relatively straightforward. Plaintiff, Marvin Canaan, was found guilty at a jury trial of first degree murder. His conviction was affirmed on appeal. In the lawsuit before this court, he has sued the attorneys who defended him at trial and on appeal, as well as one of the attorneys' investigators, for legal malpractice. Canaan filed a civil post-conviction proceeding under K.S.A. § 60-1507, but he was denied relief in the trial court and voluntarily dismissed an appeal of that ruling. Although he may yet bring additional civil actions seeking his release, no rulings have yet been made by any court that he was not provided effective assistance of counsel in his criminal proceedings, or that he otherwise is entitled to a new trial or release.

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4. *In re Coder*, __ Kan. __, 35 P.3d 853 (2001).

Appendix B

The primary argument made by defendants is that Kansas should join what it describes as "the majority of courts and hold that exoneration by post-conviction relief is an absolute prerequisite to the maintenance of a legal malpractice action arising out of a criminal proceeding."[5] We had noted in our February 14, 2000 decision that cases elsewhere were divided on this issue.[6] Upon additional review, we agree with defendants that the rule they seek to have applied here is the majority rule. We also agree with them that it is the ruling being adopted by most of the courts that have addressed this question in the recent past. And, most important, we agree that it is the rule that the Kansas appellate courts would and, we think, should apply.

Defendants' brief has exhaustively listed the cases on this point and we will not restate those authorities here. Rather, we will note some of the key considerations that lead us to the conclusion that the majority rule should be followed in Kansas. First, it would undercut respect for the legal system to allow a civil jury applying the preponderance of the evidence standard to second-guess a prior criminal trial verdict in which a jury had determined guilt beyond a reasonable doubt. In addition to differing standards of proof, quite different evidence would likely be presented in the civil trial. It is easier to force witnesses to testify in person in a criminal proceeding, and it is often easier to obtain their cooperation as well. Prosecutors are likely to present the facts differently than malpractice defense lawyers might. And the

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5. Defendants' Joint Mot. for Summ. J. at 3.

6. Mem. Dec., Feb. 14, 2000, at 13.

jury in the malpractice proceeding would never have the responsibility of actually deciding whether a person's freedom should be taken away, as occurs in all serious criminal trials. The jury whose verdict has resulted in a criminal conviction should not be second-guessed by another jury in a civil proceeding between different parties, based on different evidence, and applying a different burden of proof. Nor should the criminal sanction of a conviction, which is a sanction *on behalf of the state*, be subject to second-guessing in that manner. The solemnity of a criminal proceeding should be challenged only through formal, state-sanctioned procedures.

Second, as a practical matter, there would be every incentive for convicted defendants to file *both* a proceeding under K.S.A. § 60-1507 *and* a pro se legal malpractice claim in every case if plaintiff's position is accepted. In addition, of course, the convicted defendant also has the right of direct appeal. Defendants rightly note that the proceeding under K.S.A. § 60-1507 already affords an appropriate venue in which to claim that ineffective assistance of counsel *caused* harm to the defendant, which is the essential claim of the legal malpractice action. There simply is no cause to be served by allowing *initial* resort to a civil claim for legal malpractice.

Third, defendants appropriately suggest that allowing initial resort to a civil claim for legal malpractice, while the criminal conviction stands in place, presents a great many complexities for the malpractice case. We have discussed these complexities in several of our conferences with the attorneys in this case. Trial of the civil case would be greatly simplified, both for the court and for the jury, if it proceeds only after exoneration has been attained.

Last, the important goal of obtaining a vigorous and complete defense in the initial criminal trial is greatly furthered by the majority rule. If defense counsel knows that the convicted defendant may file a pro se legal malpractice claim immediately after conviction, counsel may engage in defensive lawyering instead of presenting the best defense available to the defendant. In the real world of jury trials, the best case is not necessarily the least risky one; in the realm of criminal trials, it is surely the case that the best defense may carry with it some risks. Our criminal justice system is premised upon the bedrock principle that the accused will have a vigorous and appropriate defense. In some settings, the possibility of tort claims may lead to better delivery of products or services. We do not believe that criminal jury trials are such a setting.

In oral argument, plaintiff contended that even if the court accepted the defendants' basic argument on this issue, two other issues would remain. First, plaintiff suggests that he has pleaded many theories other than legal malpractice and that those theories would remain alive even if Kansas adopts the exoneration approach. Second, plaintiff argues that his claims against defendant Bush, who is not a lawyer, would remain. We disagree with plaintiff on both points.

One of the uncontroverted facts alleged by defendants in the summary judgment motion was that plaintiff had "alleged various causes of action that this court deemed to be claims for legal malpractice." Plaintiff admitted that allegation. This court did, in its February 14, 2000 decision, determine that plaintiff's action, captioned "Tort Action for Legal Malpractice," was just that. As we said in our earlier

opinion, "[I]t is clear that the gravamen of this lawsuit is that his appointed public defenders and their investigator were negligent in providing services to him."[7] We believe that we have fairly characterized plaintiff's complaint and note that in some cases it simply is not possible to obtain a tactical legal advantage by recharacterizing a claim as something beyond its true essence.[8]

With regard to defendant Bush, he was the agent of one or more lawyer defendants. There is no reason to allow a claim to proceed against the agent when, for reasons of policy, it is not allowed to proceed against his principal. If exoneration is to be required before a legal malpractice action may proceed against the criminal defense attorneys, it should also be required before any type of negligence action is allowed to proceed against those attorneys' staff members or agents.

Withdrawal of Admissions

The defendants' motion to withdraw admissions previously deemed to have been made is moot based upon

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7. Mem. Dec., Feb. 14, 2000, at 31.

8. *See Gephardt v. Harris,* 261 Kan. 1007, 1021, 934 P.2d 976, 985 (1997) (refusing to allow negligent misrepresentation claim because doing so in this case would mean that "any breach of contract action could be treated as also including a negligent misrepresentation claim"). *See also Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Associates,* 262 Kan. 110, 936 P.2d 714 (1997) (pleaded claim for breach of contract held to be a tort claim based on violation of attorney-client duty imposed by law).

the court's grant of summary judgment. In the event that today's decision is appealed and the court's grant of summary judgment is reversed, however, we believe that we should proceed to rule on this motion while the argument is fresh and to allow review of our ruling in the event of an appeal.

Refusing to allow the defendants to withdraw these admissions is virtually tantamount to granting a default judgment. We summarized many of the admissions in our prior opinion.[9] These admissions should not be used for the purpose of giving plaintiff the equivalent of a default judgment in light of the Kansas Supreme Court's decision that entry of a default judgment as a discovery sanction was an abuse of discretion. The admissions were made by default of the defendants' original attorney, just as defendants' other failures to provide discovery occurred. In addition, as we noted in our prior opinion, some of the admissions are contradictory and others are, as defendants suggest, somewhat bizarre. We cannot conclude either that the presentation of this case on its merits would be served by the use of these admissions or that allowing their withdrawal would prejudice the plaintiff now that defendants have appropriately responded to discovery. Therefore, we grant the defendants' motion to allow withdrawal of their admissions, which occurred only through a failure to respond by their original counsel.

Motion for Leave to File Amended Answer

The final motion is defendant Bush's motion for leave to file a second amended answer. This motion also is moot

9. Mem. Dec., Feb. 14, 2000, at 28-29.

in light of the court's ruling on summary judgment, but the court will address it in the interests of judicial economy for the same reasons we addressed the request to withdraw admissions. We do not perceive any prejudice that would result to the plaintiff from allowing the amendment. Thus, since leave to amend generally is freely granted under K.S.A. § 60-215 unless prejudice to the opposing party would occur, we grant the motion.

Plaintiff objects that the specific affirmative defenses sought to be raised by defendant Bush were waived by not being included in his original answer and, therefore, that he should not now be allowed to raise them. We would agree that these are affirmative defenses that must be raised in a responsive pleading. That is exactly what defendant Bush seeks to do by filing an amended answer. If, under K.S.A. § 60-215, he should be given leave to amend the answer, then those defenses will have been raised in a responsive pleading by amendment. Thus, the proper issue is whether the amendment should be allowed under the standards of K.S.A. § 60-215. We find that it should.

Summary Rulings

For the reasons set forth in this opinion,

IT IS HEREBY ORDERED that plaintiff's motion for monetary sanctions is granted in part and denied in part. Defendants shall pay the sanction assessed in this decision to plaintiff's counsel within 60 days. If that amount is not paid to plaintiff's counsel within 60 days, then the court will enter judgment, jointly and severally, against the defendants

for that amount. The court will retain jurisdiction for that limited purpose.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendants' motion for reconsideration of the court's order denying their request to withdraw admissions is granted.

IT IS FURTHER ORDERED that defendant Bush's motion for leave to file a second amended answer is granted.

IT IS FURTHER ORDERED that this memorandum decision shall constitute the final entry of judgment in this case. Judgment is entered in favor of the defendants and against the plaintiff. Costs of the action are assessed against the plaintiff.

IT IS SO ORDERED.

s/ Steve Leben
Steve Leben
District Judge